93-863

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No. __

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGE L. KREGOS, doing business as American Sports Wire,

Petitioner,

v.

THE ASSOCIATED PRESS, SPORTS FEATURE SYNDICATE, INC.; COMPUTER SPORTS WORLD; KEITH GLANTZ; RUSSELL CULVER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals improperly usurped the function of the trier of fact by resolving disputed issues of material fact against the Petitioner, basing conclusions on erroneous facts and on unresolved factual issues, and granting summary judgment against the Petitioner holding as a matter of law that his copyright was not infringed and that he is not entitled to equitable tolls of the applicable statute of limitation.

2. Whether the granting of summary judgment against the Petitioner on his copyright infringement claim deprived the Petitioner of his right to a jury trial under the Seventh Amendment to the Constitution of the United States.

3. Whether the lower courts incorrectly interpreted a recent precedent of this Court to require exact identity between a copyrighted work and a copied work as a prerequisite to a holding of copyright infringement where the copyrighted work is a compilation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court granting summary judgment against the Petitioner on his claim for copyright infringement is reported at *Kregos* v. *Associated Press*, 795 F. Supp. 1325 (S.D.N.Y. 1992), a copy of which is reprinted in the Appendix at p. 22a. The opinion of the Court of Appeals affirming the grant of summary judgment is reported at *Kregos* v. *Associated Press*, 3 F.3d 656 (2d Cir. 1993), a copy of which is reprinted in the Appendix at p. 1a.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was issued on September 1, 1993. This Court therefore has jurisdiction to hear this Appeal under 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Copyright Act, 17 U.S.C. Section 501(a) states in pertinent part:

> "Anyone who violates any of the exclusive rights of the copyright owner as provided by Sections 106 through 118, or of the author as provided in Section 106A(a), or who imports copies or phonorecords into the United States in violation of Section 602 is an infringer of the copyright or right of the author, as the case may be . . ."

Copyright Act, 17 U.S.C. Section 106 states, in pertinent part:

> "Subject to Sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1). to reproduce the copyrighted work in copies or phonorecords;
>
> (2). to prepare derivative works based upon the copyrighted work;
>
> (3). to distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; . . ."

Copyright Act, 17 U.S.C. Section 507(b) states:

> (b) *Civil actions.* No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

STATEMENT OF THE CASE

Petitioner commenced this case by filing a Complaint including a cause of action for copyright infringement against defendants The Associated Press and Sports Features Syndicate, Inc. in the United States District Court for the Southern District of New York. Jurisdiction for the copyright infringement cause of action was based on 28 U.S.C. Sections 1331 and 1338(a). Defendants Computer Sports World, Keith Glantz, and Russell Culver, subsequently were added to the action by leave of the District Court.

Petitioner had been preparing a baseball pitching form for daily publication in newspapers prior to 1983. In 1983, Petitioner created a new pitching form for presenting information concerning the past performance of opposing pitchers scheduled to start each day's

baseball games. A sample of Petitioner's new form, which was first published in newspapers in the United States in April, 1983, is reproduced in the Appendix at p. 45a. The Associated Press (AP) first published a baseball pitching comparison form, supplied to it by Sports Features Syndicate, Inc. (Sports Features), in April 1984. A copy of the 1984 AP form, which is virtually identical to Petitioner's form, is reproduced in the Appendix at p. 46a. Petitioner immediately complained to AP that its 1984 form constituted copyright infringement, but was advised by an AP attorney that the Petitioner has no basis for complaint. The Petitioner also complained to the Sports Features, Inc., which represented to Petitioner that it would compensate Petitioner for the copyright infringement by providing Petitioner with future work. Sports Features further represented that any lawsuit commenced by Petitioner against it would adversely affect the health of the company's president's mother.

Relying upon these representations, the Petitioner refrained from taking any action until August, 1986 when, not having received the promised future work from Sports Features, Inc. but instead hearing only repeated excuses, Petitioner retained counsel who prepared and forwarded cease and desist copyright infringement letters to AP and Sports Features, Inc. The Petitioner applied to register his copyright claim with the Copyright Office as a prerequisite to the commencement of a suit for copyright infringement pursuant to Copyright Act, 17 U.S.C. Section 411(a). Petitioner's copyright registration was not approved by the Copyright Office until December, 1988, as a result of a two year administrative delay by the Copyright Office which stayed the processing of "screen

display copyright applications". [Although Petitioner had previously secured copyright registration for the computer software generating his pitching form, the Copyright Office only first determined that the software registration covered the screen display for the pitching form itself nearly two years later—in August, 1988. Petitioner had testified at his deposition that suit would have been commenced earlier had it been known that the software registration also covered the form itself]. During the pendency of his copyright application for the form itself, Petitioner advised counsel for both AP and Sports Features of the Copyright Office proceedings and of Petitioner's continued intent to bring suit upon registration of his claim to copyright.

In 1986, AP modified its 1984 pitching comparison form to add a new column of information (Team Record) and to modify a pre-existing category ("vs. Opp. at site" was changed to "vs. Opp."). The 1986 AP pitching comparison form is reproduced in the Appendix at p. 47a. On March 24, 1989, Petitioner commenced suit for copyright infringement in the Southern District of New York against AP and Sports Features, Inc. alleging that both the 1984 and 1986 AP pitching comparison forms infringed Petitioner's copyright to his pitching comparison form. Commencement of suit had been delayed approximately an additional 4-5 months as a result of unsuccessful negotiations with the AP attorney.

The District Court granted summary judgment against Petitioner on the grounds that his copyright was invalid as a matter of law, *Kregos* v. *Associated Press*, 731 F. Supp. 113 (S.D.N.Y. 1990). The Court of Appeals reversed and remanded the case to the

District Court for trial of the copyright infringement claim, *Kregos* v. *Associated Press*, 937 F. 2d 700 (2d Cir. 1991). Upon remand, the District Court, instead of trying the copyright claim as the Court of Appeals directed, granted summary judgment holding that the Petitioner's claim of copyright infringement against the 1984 AP form was barred by the statute of limitations and that the 1986 AP form was not an infringement because it was not "substantially similar" to Petitioner's copyrighted form, *Kregos* v. *Associated Press*, 795 F. Supp. 1325 (S.D.N.Y. 1992). The Court of Appeals affirmed the grant of summary judgment on the copyright issues, *Kregos* v. *Associated Press*, 3 F. 3d 656 (2d Cir. 1993).

SUMMARY OF REASONS FOR GRANTING WRIT

It is well established that summary judgment is not intended to cut off the right to jury trial where there are genuine issues to try, *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S. Ct. 724, 88 L. ed. 967 (1934). Summary judgment is appropriate only if there are no genuine issues as to any material fact, and the moving party carries the burden of demonstrating the absence of any factual disputes, *Hayman* v. *Commerce & Industry Insurance Co.*, 524 F. 2d 1317 (2d Cir. 1975). The function of the court in deciding a motion for summary judgment is only to determine if disputed issues of material fact exist, and not to resolve such issues, *Schering Corp.* v. *Home Insurance Co.*, 712 F. 2d 4 (2d Cir. 1983).

In granting summary judgment that the copyright to Petitioner's form was not infringed as a matter of law, the District Court determined and resolved material issues of disputed fact against the Petitioner,

thereby depriving him of his right to jury trial on these issues. The issues resolved against the Petitioner, without Petitioner being afforded the opportunity to present his case to the trier of fact, included the issue of substantial similarity which goes to the heart of the copyright infringement claim, and disputed factual issues directly bearing on Petitioner's right to equitable tolls of the statute of limitations. The District Court disregarded evidence presented to it rendering summary judgment inappropriate, while supporting its grant of summary judgment with erroneous findings and conclusions not supported by, or based on, any evidence of record.

The lower courts also incorrectly construed a recent precedent of this Court as requiring that a copyright compilation be identically copied before infringement will be found.

The decision below raises important questions concerning standards for granting summary judgment, thereby directly concerning the right to trial by jury under the Seventh Amendment in copyright infringement actions.

The decision also miscontrues precedent of this Court directly affecting the scope of protection afforded to work under the copyright law. Each of these questions are likely to reoccur, thereby rendering review by this Court appropriate.

REASONS FOR GRANTING THE WRIT

Both the District Court and the Court of Appeals concluded that the 1984 AP pitching form is virtually identical to Petitioner's copyrighted form. Although the District Court held that the statute of limitations

had expired with respect to the earlier form, Petitioner claimed that the limitations period is subject to equitable tolls on three grounds—fraudulent inducement, administrative delay and continuous infringement. Each of these grounds requires the resolution of disputed issues of material fact as now briefly discussed below.

In his fraudulent inducement claim against the Associated Press, Petitioner contended that an attorney representing the Associated Press advised him that he had no basis for his claim of infringement. Petitioner had testified during deposition that he relied upon this representation by the attorney in refraining from commencing suit. Petitioner's claim for fraudulent inducement against Sports Features Syndicate, Inc. relates to false promises made by this company concerning future work to be provided to Petitioner and representations concerning the health of the company's president's mother. Petitioner also testified at deposition that he refrained from commencing suit against Sports Features based upon these representations. The District Court found, as a matter of law, that Petitioner had no right to rely upon representations made by the Associated Press attorney notwithstanding the fact that no litigation had been commenced. The District Court further found that Petitioner was not entitled to an equitable toll based on fraudulent inducement against Sports Features on either ground alleged by Petitioner. The Court of Appeals affirmed, therefore depriving the Petitioner of his right to present his testimony and evidence to a jury for resolution of factual issues including Petitioner's reliance upon the misrepresentations made to him in refraining from commencing

suit, and whether he acted reasonably in his reliance under the circumstances of the case.

The Copyright Act, 17 U.S.C. Section 411(a) requires, as a prerequisite to commencing a copyright infringement suit, that copyright registration of the copyright claim has been made, or that a deposit, application and fee for registration have been delivered to the Copyright Office in proper form and registration has been refused. As a result of administrative delay in the Copyright Office, Petitioner's application for registration of his claim to copyright was delayed nearly two (2) years. The District Court, in refusing to toll the statute of limitations on this ground, merely stated that Petitioner should have applied for his copyright registration earlier. The Court of Appeals affirmed on the same basis without any further explanation. Petitioner contends that it is a clearly disputed issue of material fact whether he acted reasonably under the circumstances, and thus should be entitled to a toll of the statute of limitations corresponding to the length of the administrative delay in the Copyright Office which was not caused by the Petitioner himself. The Petitioner contends that it is unreasonable for the District Court to hold, as a matter of law, that Petitioner is not entitled to an equitable toll of the statute of limitations based on an administrative delay over which Petitioner had no control.

Petitioner also contends that the copyright statute of limitations should be equitably tolled based upon the continuous-infringement doctrine, as exemplified by *Taylor* v. *Merrick*, 712 F.2d 1112 (7th Cir. 1983), and *Woods Hole Oceanographic Institute* v. *Goldman*, 228 USPQ 874 (S.D.N.Y. 1985). These decisions ap-

pear to conflict with *Stone* v. *Williams*, 970 F.2d 1043 (2d Cir. 1992) relied upon by the Court of Appeals in affirming the grant of summary judgment against Petitioner. The Court of Appeals affirmed the District Court, concluding that the 1984 and 1986 AP forms were two separate works, thus not entitling Petitioner to rely upon the continuous infringement doctrine. The Petitioner respectfully submits that the conclusion of the District Court is erroneous and requires the resolution of disputed issues of material fact, including a determination of whether the 1984 and 1986 AP works are sufficiently similar to each other to permit the continuous infringement doctrine to be applied, and if the later AP pitching form may properly be considered a derivative work of the earlier 1984 pitching form. Conclusions based upon such factual findings by the trier of fact are necessary to the proper determination of whether the continuing infringement doctrine is applicable to the facts and circumstances of this case. The grant of summary judgment by the District Court, and its affirmance by the Court of Appeals holding that the earlier and latter AP pitching comparison forms are separate works, is a conclusion based upon unresolved and disputed issues of material fact. This conclusion is contradicted by the deposition testimony of AP itself which acknowledged the minor nature of the differences between the earlier and later AP forms.

The District Court concluded, and the Court of Appeals affirmed the conclusion, that the 1986 AP pitching comparison form differs in more than a trivial degree from the Petitioner's copyrighted pitching comparison form. Petitioner submits that this conclusion is based upon disputed material issues of fact

improperly resolved by the District Court on a motion for summary judgment. Access and substantial similarity are factual issues for the trier of fact in a copyright infringement suit, and summary judgment on the grounds of no substantial similarity between works is generally disfavored. *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946); *Twentieth Century Fox Film Corp.* v. *MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983). The District Court, in concluding that the respective forms were not substantially similar, made clearly erroneous findings namely—that the 1986 AP form included two categories of information not appearing in Petitioner's form. In fact, as the Court of Appeals recognized in its decision, the latter AP form included only one category of information ("Team Record") not appearing in Petitioner's copyrighted form, and also that the AP form modified a pre-existing category appearing in both its earlier form and Petitioner's copyrighted form (i.e.—the 1986 AP form changed the "vs. opp. at site" category to "vs. opp"). Nonetheless, the Court of Appeals (after making its own erroneous finding attributing to the Petitioner a category of information (career stats) that never appeared in the Petitioner's copyrighted form) concluded, without the benefit of resolution by the trier of fact, that the respective forms differed in a degree which was not "trivial". Notwithstanding a basic error relied upon by the District Court at several different instances in its opinion in support of the grant of summary judgment, the Court of Appeals, after making a further erroneous finding, and without the benefit of the trier of fact, concluded that the respective forms are not substantially similar as a matter of law. The District Court and the Court of Appeals (in its 1993 decision) each disregarded the fact that the later AP form

contains 6 of 9 columns of the Petitioner's copyrighted form. Both the District Court and the Court of Appeals usurped the function of the jury by granting summary judgment based upon clearly erroneous factual findings by both the District Court and the Court of Appeals.

The District Court and the Court of Appeals considered Petitioner's category of "Vs. Opp. at Site" to be a different category of information from the AP category of "vs. Opp". Without any evidence in support of its conlusion, the Court of Appeals determined that "the fact that the numbers in these two categories may occasionally coincide does not change the fact that the categories *measure* different, albeit overlapping, occurrence data . . ." Yet, the degree of difference between the categories of information including the subject matter measured by the different categories, is a disputed issue of material fact directly affecting the resolution of the substantial similarity issue of copyright infringement. No evidence was considered by either the District Court or the Court of Appeals to support the conclusion that the "Vs. Opp at Site" and "Vs. Opp" categories of information are different in more than a trivial degree.

Although it is axiomatic that in deciding a motion for summary judgment a Court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party, *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243 (2d Cir. 1985), the District Court in the instant case failed to consider relevant evidence of substantial similarity between Petitioner's copyrighted form and the later AP form. Most notably, a representative of the Associated Press testified at deposition that the changes to the 1986

AP pitching comparison form, relied upon by the District Court and the Court of Appeals in granting summary judgment of non-infringement, were not considered to be significant (Dep. Testimony of Mr. Darrell Christian, Sports Editor for the Associated Press, at a deposition of AP taken on March 19, 1992). The testimony of the AP representative, which was not even considered by the District Court in granting summary judgment, raises disputed issues of material fact going directly to the issue of substantial similarity and copyright infringement.

The District Court also failed to consider additional relevant evidence on the issue of substantial similarity between Petitioner's copyrighted form and latter AP form. The AP attorney, after insisting for the better part of twelve (12) hours of Petitioner's deposition that a newspaper (*The Hartford Courant*) merely forgot to change pitching form "Headings" and "Explanations" when that newspaper changed its subscription from Petitioner's form to the latter AP form, ultimately acknowledged his error on the record and conceded his inability to distinguish between the two forms. *The Hartford Courant* itself, when it ceased publishing Petitioner's form and commenced publishing the AP 1986 form, was able to maintain nearly all of Petitioner's "Heading" and "Explanation" intact, and further retained a column designation ("MBA") used by Petitioner and not the designation used by AP ("AHWG") for the same column of information, thereby evidencing that the respective forms are not only substantially similar, but are for the most part, interchangeable. Moreover, the District Court, in its first opinion granting summary judgment against Petitioner, *Kregos* v. *Associated*

Press, 731 F. Supp. 113 (S.D.N.Y. 1990), describes the differences between the earlier and later AP forms as ". . . cosmetic distinctions . . ." which ". . . do not represent appreciable differences between the forms". In this regard it is significant to note that both the District Court and the Court of Appeals have consistently acknowledged that the Petitioner's copyrighted form and the earlier (1984) AP form are virtually identical to each other.

It is further noted that the last opinion rendered by the last opinion rendered by the Court of Appeals in this case is inconsistent with the earlier opinion rendered by the same Court in the same case. In its 1993 opinion, *Kregos* v. *Associated Press*, 3 F. 3d 656 (2d Cir. 1993), the Court stated ". . . there are a limited number of statistics generally considered outcome predictive by those familiar with the sport". In its earlier decision, *Kregos* v. *Associated Press*, 937 F. 2d 700 (2d Cir. 1991), the Court noted that "If the universe of available data included even 20 items and a selector was limited to 9 items, there would be 167,960 combinations of items available.". In addition to the inconsistency between the two opinions, Petitioner further notes that the Court's first conclusion, namely that there are a limited number of statistics generally considered outcome predictive by those familiar with the sport, constitutes an unsupported factual finding made by the Court.

The opinions of the District Court and the Court of Appeals are contrary to earlier precedents of the Second Circuit and decisions from other courts of appeal. The District Court appears to have confused the standards for copyrightable originality and copyright infringement (substantial similarity), and the

Court of Appeals failed to correct this error. Assuming *arguendo* that the AP 1986 form was a distinguishable variation from the earlier 1984 AP form (and thus a distinguishable variation from Petitioner's form which is virtually identical to the earlier AP form), copyright infringement is not necessarily avoided. A later work may be "a distinguishable variation" of an earlier work (and even entitled to its own copyright protection) but nonetheless infringe the copyright in an earlier work. The standards for originality and for substantial similarity should not be confused, since while a mere "distinguishable variation" will constitute a sufficient quantum of originality to support a copyright in such variation, the same "distinguishable variation" in one work may not sufficiently alter its substantial similarity to another so as to negate infringement. The test for copyright protection is not the same for infringement avoidance. See, for example, *L & L White Metal Casing Corp.* v. *Joseph*, 387 F. Supp. 1349 (E.D.N.Y. 1975); *Puddu* v. *Buonamici Statuary, Inc.*, 450 F.2d 401 (2d Cir. 1971); *Eden Toys, Inc.* v. *Floralee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982). In the instant case, both the District Court and the Court of Appeals based its conclusion of non-infringement, at least in part, on the addition of a new category of information (Team Record) to the AP 1986 form which did not appear on Petitioner's copyrighted form. To the extent that the Court relied upon this added category as avoiding copyright infringement, it applied the incorrect standard of copyright originality.

The lower courts also have incorrectly interpreted *Feist Publications, Inc.* v. *Rural Telephone Serv. Co.*, 111 S.Ct. 1282 (1991) as requiring exact identity be-

tween a copyrighted work (Petitioner's Form) and a copied work (the 1986 AP form) if the copyrighted work is a compilation. Although *Feist* did recognize that in certain instances the original authorship of a compilation will not meet the modicum of creativity necessary to support a copyright, this decision did not impose an exact identity requirement for copyright infringement of a compilation. The standard of copyright infringement for a compilation, both before and after *Feist,* is substantial similarity. The lower courts failed to apply the correct standard of substantial similarity in determining that the 1986 AP form did not infringe Petitioner's form as a matter of law but, in fact, appeared to require exact identity (e.g., that the forms not differ in more than a trivial degree) before infringement would be found. (Appendix at pp. 12a-15a).

CONCLUSION

In concluding, the grant of summary judgment of non-infringement of Petitioner's copyright by the District Court and the affirmance of the grant of summary judgment by the Court of Appeals is inappropriate because it relied upon 1). disputed issues of material fact, and 2). conclusions not supported by an evidence of record before the Court. The District Court also improperly disregarded evidence establishing the existence of disputed issues of material fact. The Court usurped the function of the trier of fact by resolving disputed issues of material fact, and failed to resolve all ambiguities and draw all reasonable inferences in favor of the Petitioner. The Court, once having found disputed issues of material fact, was required to preserved those issues for trial, and not cut off the Petitioner's right to a jury.

The lower courts also appeared to apply the incorrect standard of exact identity, not the correct standard of substantial similarity, in determining copyright infringement of compilations, an issue directly affecting protection afforded under the copyright laws and an issue which is likely to be raised again.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 619—August Term 1992

(Argued: January 4, 1993 Decided: September 1, 1993)

Docket No. 92-7735

GEORGE L. KREGOS, doing business as American Sports Wire,

Plaintiff-Appellant,

—v.—

THE ASSOCIATED PRESS,

Defendant,

SPORTS FEATURE SYNDICATE, INC.; COMPUTER SPORTS WORLD; KEITH GLANTZ; RUSSELL CULVER,

Defendants-Appellees.

Before:

PRATT and MAHONEY, *Circuit Judges*, and Robert C. ZAMPANO, *District Judge* for the United States District Court of Connecticut, sitting by designation.

Appeal from judgment of the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, dismissing copyright, fraud, and unfair-competition claims brought by owner of copyrighted pitching form against publishers of similar form.

Affirmed.

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NICHOLAS L. COCH, New York, NY (Shea & Gould, New York, NY, of counsel), *for Defendant-Appellee Associated Press.*

NORMAN E. LEHRER, Cherry Hill, NJ (Perla M. Kuhn; Kuhn & Muller, New York, NY, of Counsel), *for Defendants-Appellees Sports Feature Syndicate, Computer Sports World, Glantz, and Culver.*

PRATT, *Circuit Judge*:

Plaintiff-appellant George Kregos ("Kregos") appeals from a judgment entered in the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, that granted defendants' motion for summary judgment and dismissed Kregos's claims of copyright infringement, fraud, and unfair competition. This is the fourth reported opinion in this action. In the first decision the district court concluded that Kregos's pitching

forms were not copyrightable. *Kregos v. Associated Press*, 731 F. Supp. 113 (S.D.N.Y. 1990) ("*Kregos I*"). On appeal, we held that remand was necessary, principally to determine whether Kregos's selection of pitching statistics reflected sufficient originality to be copyrightable as a compilation. *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991) ("*Kregos II*"). Kregos now appeals from the district court's post-remand decision, which held that the Kregos and AP pitching forms were not "substantially similar". *Kregos v. Associated Press*, 795 F. Supp. 1325 (S.D.N.Y. 1992) ("*Kregos III*").

BACKGROUND

Since the facts of this case are comprehensively reported in *Kregos I*, we briefly summarize here only those facts relevant and necessary to this appeal. Since 1983 Kregos, doing business as American Sports Wire, has provided a number of newspapers across the country with his selection of statistics on baseball pitchers arranged into what are known in the business as "pitching forms". The forms are of interest to avid fans and gamblers, because by comparing the performances of the pitchers in an upcoming game they provide a basis for predicting the winner. Examples of the forms may be found in the appendices to Judge Goettel's 1990 opinion. *Kregos I*, 731 F. Supp. at 122-24. In late 1983, Kregos sent to the Associated Press ("AP") a copy of his form, seeking syndication; AP, however, rejected it. In 1984, AP made available to its subscribers for the first time a pitching form created by its own writers ("1984 form"); AP's form was "nearly identical" to the Kregos form. *Kregos III*, 795 F. Supp. at 1327. An internal AP memo stated that in creating its form, AP writers had consulted "various

other forms including the [Kregos] form, but [had] used them only as examples." *Id.* at 1328.

In 1986, AP revised its pitching form ("1986 form"), making three relevant changes to its earlier 1984 form. *See Kregos I*, 731 F. Supp. at 115. First, the AP's 1986 form added a new category, "TEAM REC", a category that represented the team's record in games started by the particular pitcher during the current season. *Id.* Second, while the AP and Kregos forms both contained a category detailing the pitchers' records—wins, losses, innings pitched, and earned-run average—the Kregos form specified this record only for games played at the site of the upcoming game, whereas AP's 1986 form presented that information for all games played against that opponent. AP's third change was to include in the "VS OPP" (against this opponent) category only the current season's information, not the career statistics provided by the Kregos and 1984 AP forms. *Id.*

When Kregos first accused AP of unlawfully using his form in 1984, *Kregos III*, 795 F. Supp. at 1328, AP lawyers misinformed him that the form was not copyrightable. Kregos conceded that he felt this advice was incorrect, but he waited until June of 1985 to seek copyright protection both for his form and for the computer software he had developed to create it. *Id.* Kregos's application for copyright registration was not approved until December 1988 due to newly enacted legislation regarding copyright applications for computer-screen displays. *Id.*

A. *1990 District Court Opinion*: Kregos I.

Kregos commenced this copyright and trademark infringement action in March 1989 against both AP and

its supplier of baseball statistics and pitching forms, Sports Features Syndicate, Inc. ("Sports Features"), claiming that both the 1984 and the 1986 pitching forms directly infringed his works. *Kregos I*, 731 F. Supp. at 116.

Holding that Kregos's pitching form was not copyrightable, the district court granted summary judgment to AP and dismissed Kregos's claims. Judge Goettel additionally held that Kregos's forms were "functional" and thus not protected by trademark laws. *Id.* at 121-22 (construing Lanham Trademark Act, § 43(a), 15 U.S.C. § 1125(a)). Granting protection to the form itself "would preclude any other supplier from publishing an authentic pitching form." *Id.* at 121. Further, any curtailing of the right to use the general categories used by Kregos, namely, wins, losses, innings pitched, and earned-run average, would exact a "substantial limitation on competition." *Kregos I*, 731 F. Supp. at 122.

B. *First Appeal*: Kregos II.

On appeal, we remanded the case to the district court for further proceedings to determine whether Kregos had displayed enough selectivity to satisfy the requirement that his work be original. *Kregos II*, 937 F.2d at 710. We held that the validity of Kregos's compilation copyright could not be rejected for lacking, as a matter of law, the requisite originality and creativity. We also held that Kregos's forms did not evince a merger of idea and expression, because the potentially relevant data about pitching were numerous, and there were numerous means of expressing the idea of rating pitchers' performances. We further held that the district court erred in holding the "blank form" doctrine barred copyright in this case, because Kregos's forms, unlike check stubs, or a blank diary, convey information. *See Kregos II*, 937 F.2d at 708.

We affirmed the district court's dismissal of Kregos's claims under § 43(a) of the Lanham Trade-Mark Act, 15 U.S.C. § 1125(a).

C. *District Court's Opinion after Remand*: Kregos III.

After the remand, the district court permitted Kregos to file an amended complaint. *Kregos III*, 795 F. Supp. at 1328. In addition to copyright infringement, Kregos asserted claims under New York law for unfair competition and fraud. He also named additional defendants, Computer Sports World, Keith Glantz, and Russell Culver, in claims of contributory infringement.

On defendants' motions, the district court dismissed the amended complaint. *Id.* at 1337. On the copyright-infringement claims, the court granted summary judgment as to the 1984 form, because the action was time-barred, *id.* at 1330-31, and, as to the 1986 form, because there was no substantial similarity between Kregos's form and the AP form. *Id.* at 1334. The court dismissed the common-law fraud claims because Kregos did not establish the requisite elements under New York law. *Kregos III*, 795 F. Supp. at 1334-35. Finally, the court dismissed the unfair-competition claim, because it was preempted by federal law. *Id.* at 1336-37.

We affirm.

DISCUSSION

A. *The Copyright-Infringement Claims.*

The district court on remand granted summary judgment in favor of AP on Kregos's copyright-infringement claims relating to both the 1984 form and 1986 forms.

Summary judgment under Fed. R. Civ. P. 56(c) is appropriate only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." The moving party has the burden of demonstrating the absence of any material factual dispute, and the court must make all reasonable inferences in favor of the nonmoving party. *Heyman v. Commerce & Industry*, 524 F.2d 1317, 1320 (2d Cir. 1975); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). We review a grant of summary judgment *de novo*. *Healy v. Rich Products Corp.*, 981 F.2d 68, 72 (2d Cir. 1992).

1. *The 1984 Form.*

A copyright-infringement action requires the copyright owner to prove copying of a copyrighted work by an infringer. *See Weissman v. Freeman*, 868 F.2d 1313, 1320 (2d Cir.), *cert. denied*, 493 U.S. 883 (1989). However, such an action must be commenced within three years after the claim accrued. 17 U.S.C. § 507(b); *see also Mount v. Book-of-the-Month Club, Inc*, 555 F.2d 1108, 1110-11 (2d Cir. 1977); *Gaste v. Kaiserman*, 669 F. Supp. 583, 584 (S.D.N.Y. 1987). While AP used its 1984 form until October 1985, Kregos did not initiate suit until March 1989. Thus, Kregos's claim for infringement by the 1984 form was filed at least five months late.

Kregos, however, requested the district court to exercise its equitable discretion to toll the statute of limitations on three grounds—fraudulent inducement, administrative delay, and continuous infringement; the court declined.

a. *Fraudulent Inducement.*

Kregos stated that when he confronted AP about using his pitching form in 1984, an AP attorney informed him

that the form was not copyrightable and that he had no legal claims against AP. Kregos also stated that AP's supplier of forms, Sports Features, fraudulently induced his delay in filing suit by telling him that his lawsuit would injure the health of the mother of the president of Sports Features, and that dropping all legal action would prompt Sports Features to find additional work for Kregos. No additional work materialized, and Kregos claims that these misrepresentations induced him to delay legal action until 1989.

A decision whether to equitably toll a statute of limitations is left to the sound discretion of the district court, and should not be disturbed absent an abuse of that discretion. *Banner Indus. v. Central States Pension Fund*, 875 F.2d 1285, 1294 (7th Cir. 1989); *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 693-94 (10th Cir. 1981). We find no abuse of discretion here.

The district court did not err in refusing to toll the limitations period simply because of Kregos's claimed reliance on AP's counsel, who stated that the forms were not protectible in copyright. Kregos could have easily sought another opinion, and relying on the legal opinion of another's attorney is unreasonable when both parties are aware adverse interests are being pursued. *See, e.g., Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1016 (2d Cir. 1989) (in securities-misrepresentation case, unreasonable to rely on adversary's interpretation of New York statute); *MWS Wire Indus. v. California Fine Wire Co.*, 797 F.2d 799, 802-03 (9th Cir. 1986) (plaintiffs' reliance on adversary's representation of strength of their legal claim in reaching settlement agreement not grounds to rescind settlement contract). Moreover, Kregos discovered the statements were false as

early as 1986, well before the statute of limitations had run its course. *Kregos III*, 795 F. Supp. at 1335.

Kregos argues that equitable tolling is also warranted due to Sports Features false representation that it would send more work to Kregos if he delayed suit. We cannot conclude that the district court abused its discretion by holding Kregos's continued reliance on these empty promises was unreasonable and without justification. *Id.* at 1331.

b. *Administrative Delay.*

Kregos's second ground for equitable tolling was based upon administrative delay by the copyright office in approving his copyright registration, which he claims prevented him from bringing suit sooner. The district court rejected this ground largely because Kregos was aware that AP had printed a "virtually identical" pitching form daily throughout the entire 1984 season and much of the 1985 season, yet he did not apply for copyright registration until June 25, 1985, and December 29, 1986. *Kregos III*, 795 F. Supp. at 1328. Had plaintiff sought a copyright registration earlier, the two-year delay would not have mattered; we see no abuse of discretion.

c. *Continuing Infringement.*

Kregos's third claim for tolling was based on the continuous-infringement doctrine. Kregos claims the infringement was continuous because of the similarities between the 1984 and 1986 forms. The district court rejected this theory, holding that the 1984 form and the 1986 form were two separate works. We agree.

Kregos's reliance on *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983) and *Woods Hole Oceanographic Institute*

v. Goldman, 228 U.S.P.Q. 874 (S.D.N.Y. 1985) is misplaced. In *Taylor*, plaintiff distributed maps of three Illinois lakes for fishermen; the maps were copyrighted in 1974. Defendant copied the maps without authorization in 1976 or 1977 and then sold them. Plaintiff brought suit in 1980, four years after the statute of limitations had begun to run. The seventh circuit tolled the three-year limitation period based on a theory that the infringement was continuing; it reasoned that the initial copying was not a separate and completed wrong, but simply the first step in a course of wrongful conduct. *Id.* at 1119.

In *Woods*, a workstudy student wrongly asserted copyright ownership of a research film he had created for his employer. Following the decision in *Taylor*, the district court permitted the claim, holding that the statute of limitations "is triggered by the last infringing act of a continuing wrong". The student had continuously asserted ownership of the film, and the action was brought well within three years from the date of the last act of infringement.

The continuing-infringement doctrine elaborated in *Woods* and *Taylor* is both inapplicable on these facts and unavailable in this circuit. Factually, *Woods* and *Taylor* are distinguishable from our case; as the district court noted, each involved a "single infringing work, not easily separable, that occurred both before and after the statute of limitations period had expired." *Kregos III*, 795 F. Supp. at 1330. In contrast, the AP's 1986 form is significantly different from its 1984 form, as we later discuss. In addition, our recent decision in *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992), pointed out the disfavor that the continuing-infringement doctrine has received in the copyright-infringement context. We held in *Stone* that when infringements occur during the limitations period,

recovery may not be had for the earlier infringements; rather, "[r]ecovery is allowed only for those acts occurring within three years of suit". *Id.* at 1049-50.

In sum, we conclude that the district court correctly rejected the tolling claims and found Kregos's copyright-infringement claims against all defendants regarding the 1984 form to be time-barred.

2. *The 1986 Form.*

Since Kregos's infringement claims relating to the 1986 form fall within the three-year statute of limitations, we must address those claims on their merits. In order to make out a copyright-infringement claim, Kregos must establish that AP or Sports Features copied his 1986 form. *See, e.g., Weissman*, 868 F.2d at 1320. Since direct evidence of copying is rarely possible, copying is generally established by showing (a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectible material in the two works. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

a. *Access.*

Because Kregos's forms have been published in newspapers since 1983, AP clearly had access to them. Moreover, Kregos in 1983 had sent AP a copy of his form, hoping for syndication, and AP admitted to using his form as a model for its virtually identical 1984 form.

b. *Substantial Similarity.*

The critical issue, therefore, is whether the Kregos form and AP's 1986 form are substantially similar. The district court held that they were not. *Kregos III*, 795 F. Supp. at 1333-34. To determine whether the grant of summary judgment was proper, we must decide whether the lack of substantial similarity between the protectible aspects of the works was "so clear as to fall outside the range of disputed fact questions" requiring resolution at trial. *Walker*, 784 F.2d at 48. Summary judgment may be appropriate when the similarity between the competing works concerns only "'*non*-copyrightable elements of the plaintiff's work,'" or when "no reasonable jury, properly instructed, could find that the two works are substantially similar". *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (emphasis in original; citations omitted).

In holding that Kregos's pitching form is entitled to copyright protection, we stated in *Kregos II* that a factual compilation capable of being expressed only in a limited number of ways is afforded only limited protection. *Kregos II*, 937 F.2d at 704, 710; *see Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 111 S. Ct. 1282, 1290 (1991). Protection is limited because of a principle fundamental to copyright law: a copyright does not protect an idea, but only the expression of an idea. *Baker v. Selden*, 101 U.S. 99, 103 (1879); *Mazer v. Stein*, 347 U.S. 201, 217-18. To the extent the expression merges with the idea, the merger doctrine precludes protection of that expression. *Kregos II*, 937 F.2d at 705. We earlier held that the relevant idea in this case was "to publish an outcome predictive pitching form". *Kregos II*, 937 F.2d at 706. Kregos effectuated or expressed that idea with his selection of specific pitching statistics. Because there are a variety of selections that Kregos could have chosen for his

form to render it in some way outcome predictive, we held in *Kregos II* that no merger occurred here. *Id.* at 707.

The panel in *Kregos II* expressed doubts, however, about whether Kregos could establish infringement by AP's 1986 form, because Kregos's copyright protection is limited to the particular selections he made, and while

> Kregos can obtain a copyright by displaying the requisite creativity in his selection of statistics, * * * if someone else displays the requisite creativity by making a selection that differs in more than a trivial degree, Kregos cannot complain.

Kregos II, 937 F.2d at 710.

AP's 1986 form differs from Kregos's form by far more than a "trivial degree". The Kregos form lists 9 statistics which measured (i) the pitcher's season record, including won-lost ("W-L") and earned run average ("ERA"); (ii) the pitcher's record versus the opponent at the site of the game, including W-L, ERA, and innings pitched ("IP"), and (iii) the pitcher's record in the last three starts, including W-L, ERA, and IP, and the average hits and walks for nine innings, which Kregos called MBA (men on base average).

The 1986 AP form lists 10 statistics which measured (i) the pitcher's season record, including W-L and ERA; (ii) the team's W-L record against all opponents when that pitcher started; (iii) the pitcher's record versus the opponent including W-L, IP, and ERA; and (iv) the pitcher's record for his last three starts including W-L, IP, ERA, and what AP called AHWG, the average hits and walks per nine innings. Kregos's MBA and AP's AHWG categories thus report the same information under different titles.

Six of the ten statistics on these two forms are identical: (1) season W-L, (2) season E.R.A., (3) last three starts W-L, (4) last three starts IP, (5) last three starts E.R.A., and (6) last three starts MBA or AHWG. The 1986 AP form differs, however, from the *Kregos* form in three ways. First, the second major category of statistics regarding the pitcher's ability against the scheduled opponent, a category common to both forms, is calculated differently by each. The Kregos form is more specific, labeling the category "vs. team at site" and listing the W-L, IP, and ERA applicable for previous games against the opponent played *at the site* where the next game is scheduled. In contrast, the AP form calculates these statistics under the label "VS OPP" from the games played against the scheduled opponent, regardless of where those games were played. Second, in the 1986 form, AP limits the statistics provided in the "VS OPP" category to the current season; the Kregos form lists the pitcher's career statistics. The third difference is probably the most significant: the 1986 AP form includes a completely new category of statistics labeled "TEAM REC"; the legend to the form tells us that this lists the "[t]eam's record in games started by today's pitcher."

These three AP alterations mean that four of AP's ten statistics are different from those calculated on the Kregos form: (1) the team's W-L record when that pitcher started (not present on the Kregos form), and the pitcher's (2) W-L, (3) IP, and (4) ERA records versus the opponent.

Kregos contends that AP's change to listing the pitcher's record "vs. opp", rather than his "vs. team at site" is insignificant, because W-L, IP, and ERA figures therein may, at certain points in the season, be identical. A statistic is defined by the parameters set for measurement by the research. Unquestionably, the pitcher's record

"at site" is different from his record "vs. opp"; the fact that the numbers in these two categories may occasionally coincide does not change the fact that the categories *measure* different, albeit overlapping, occurrence data. Stated differently, Kregos's copyright does not extend to the compiled facts, *i.e.*, the actual numbers, but only to the original selection of which facts to compile. *Feist*, 111 S. Ct. at 1287.

We do note that the district court erroneously considered the 1986 form to be different from the Kregos form in one additional way; it interpreted the AP's new "TEAM REC." category to include both the total team record for the season and, what it did actually contain, the team record for games started by that day's pitcher. The district court stated, "The 1986 form includes two categories not appearing in the Kregos form, 'Team Record' and the team's season record for games started by that day's pitcher." *Kregos III*, 795 F. Supp. at 1332. The court later repeated the error, stating, "the 1986 AP form contains two statistics totally absent from the Kregos form, the team's won-loss record for the season and the team's won-loss record for the season when that day's pitcher has started the game". *Id.* at 1333. The effect of this error, however, merely caused the district court to conclude that the 1986 AP form contained *five* out of ten different statistics, when in fact, *four* out of ten are different. Whether the differences represent 50% or 40%, one thing is clear: the degree of difference is not "trivial."

Thus, despite this small error, these forms were not substantially similar as a matter of law. As we suspected in *Kregos II*, much of the similarity between the AP and Kregos forms is necessitated because there are a limited number of statistics generally considered outcome-predictive by those familiar with the sport.

In short, because the forms are not substantially similar, defendants cannot be liable for copyright infringement.

B. *Common Law Fraud.*

Plaintiff also makes common-law fraud claims under New York law against both AP and Sports Features. These claims mirror his arguments for equitable tolling, and are equally unpersuasive. Against AP, he claims that but for the false statements made by AP's attorney that his pitching form was not copyrightable, Kregos would have applied for a copyright sooner, would have received it earlier, and hence, would have brought his infringement claim based on the 1984 form within the period of limitations. Kregos's fraud claim against Sports Features rests on two acts. First, Kregos claims that Sports Features promised him employment in return for not pursuing legal action in this matter, but such work never followed. Secondly, the president of Sports Features, Ronald Sataloff, represented to Kregos that Sataloff's mother was "seriously ill", and that any "lawsuit commenced by Kregos would kill her."

The district court held that the AP was entitled to summary judgment on this claim, because Kregos had no reasonable right as a matter of law to rely upon legal opinions offered by the AP, "an entity occupying an adversarial position" when it made the allegedly fraudulent statement. *Kregos III*, 795 F. Supp. at 1334. We affirm. To prove common-law fraud, a plaintiff must show (1) that there was a material, false representation, (2) made with knowledge of its falsity, and (3) an intent to defraud (4) that plaintiff reasonably relies upon, (5) causing the plaintiff damage. *Diduck v. Kaszycki & Sons. Contractors, Inc.*, 974 F.2d 270, 274 (2d Cir. 1992). As we

noted earlier in the discussion of Kregos's claim for equitable tolling, it is unreasonable for one to rely on the advice of an adversary's counsel to the extent when both parties are aware that adverse interests are being pursued. *See, e.g., Royal American Managers*, 885 F.2d at 1011; *MWS Wire Indus.*, 797 F.2d at 799. Without reasonable reliance, there is no fraud.

The district court also rejected the fraud claims against Sports Features, concluding that Kregos failed to establish that the misrepresentations had caused him a direct and proximate injury. Here, also, we agree. New York law awards only "out-of pocket" expenses in fraud cases, entitling plaintiffs to damages solely for their actual pecuniary losses. *Dress Shirt Sales, Inc. v. Hotel Martinique*, 190 N.E.2d 10, 12 (N.Y. 1963); *Raymond Corp. v. Coopers & Lybrand*, 482 N.Y.S.2d 377, 379 (N.Y. App. Div. 1984). Those losses must be the direct, immediate, and proximate result of the misrepresentation. *Goldberg v. Malinckrodt, Inc.*, 792 F.2d 305, 307 (2d Cir. 1986). The damages must also be independent of other causes. *Bennett v. United States Trust Co.*, 770 F.2d 308, 316 (2d Cir. 1985).

As Judge Goettel stated, "the only conceivable damages plaintiff could claim is that the fraudulent representations made by Sports Features prevented plaintiff from commencing a copyright infringement action for the 1984 AP form before the three-year statute of limitations expired." *Kregos III*, 795 F.2d at 1335. In essence, under New York law, Kregos claims damage that is too remote; we are not permitted to speculate what potential award he might have obtained from winning a copyright case against Sports Features. *See, e.g., Lehman v. Dow Jones & Co.*, 783 F.2d 285 (2d Cir. 1986) (speculative claim such as loss of "finder's fee" not recoverable in fraud); *Gouldsbury v.*

Dan's Supreme Supermarket, Inc., 546 N.Y.S.2d 379 (N.Y. App. Div. 1989) (damages from potential court claim too remote to be recoverable in fraud action).

The district court correctly dismissed Kregos's common-law fraud claim against both AP and Sports Features.

C. *Unfair Competition.*

Upon remand from our prior decision that dismissed Kregos's claims under § 43(a) of the Lanham act, Kregos amended his complaint to state a claim of unfair competition for false designation of origin under New York statutory and common law. *Kregos III*, 795 F. Supp. at 1328. His amended complaint stated that the publication and distribution of the copied form bearing a copyright notice in the name of Sports Features "intentionally misrepresents the authorship of the form distributed by 'AP', and constitutes deceptive acts and practices under Section 349 of the New York General Business Law and false advertising under Sections 350, 350-a and 350-e of the New York General Business law."

The district court held that (1) the action was preempted by 17 U.S.C § 301 of the copyright law, and (2) in any event, the state-law claim for unfair competition must fail, because the Kregos and 1986 AP forms were not substantially similar. *Kregos III*, 795 F. Supp. at 1337. We affirm on both grounds.

Kregos contends that his claim of unfair competition is not preempted, because it requires proof of an "extra element" beyond that required for federal copyright infringement. A state cause of action is preempted by federal copyright laws if the subject matter of the state-law right falls within the subject matter of the copyright laws and the state-law right asserted is equivalent to the exclusive

rights protected by federal copyright law. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). No preemption occurs if:

> [A]n "extra element" is "required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action," then[,] the right does not lie 'within the general scope of copyright'. A state law claim is not preempted if the "extra element" changes the "nature of the action so that it is *qualitatively* different from a copyright infringement claim.

Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992) (citations omitted and emphasis in original).

The court in *Computer Assocs.* then noted that application of this "extra element" test has led to holdings that § 301 preempts unfair competition and misappropriation claims grounded solely in the copying of a plaintiff's protected expression. *Id.* at 717. In contrast, unfair-competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets have been held to satisfy the extra-element test and avoid § 301 preclusion.

The district court was correct to locate Kregos's unfair-competition claim in the former, preempted category; as Kregos has formulated his pleadings, the claim contains no element to qualitatively differentiate it from those areas protected by copyright. Kregos contended that the extra element that differentiated his case from copyright was a false designation of ownership that arose from defendant's use of the form with false copyright information. The district court properly rejected this somewhat

convoluted argument by noting that the copyright on AP's 1986 form was not an element of his claim; Kregos could have established a false designation of ownership by the defendants in "the mere reproduction of Kregos' form by the AP, without any signature of false copyright notice of any outward sign of ownership". *Kregos III*, 795 F. Supp. at 1337.

This body of law, however, does not support Kregos's position. The common law of unfair competition in New York requires proof of no element that is in excess of those elements necessary to establish a copyright-infringement action. Kregos's unfair-competition and misappropriation claims, based solely on the copying of the protected expression in his forms, are preempted by § 301. *Computer Assocs.*, 982 F.2d at 4766. In this case, the state unfair-competition claim is equivalent to copyright:

> The mere reproduction of Kregos' form by the AP, without any signature of false copyright notice of any outward sign of ownership, could itself support a state claim for false designation of ownership. The appearance of a pitching form in a newspaper's sports page, if not expressly attributing the work to someone else, implies that the form was the creation of a person on the newspaper's staff.

Kregos III, 795 F. Supp. at 1337.

Kregos's state-law right, therefore, falls within the subject matter of the copyright laws and is accordingly preempted.

D. *Contributory Infringement.*

In the amended complaint, Kregos advanced additional claims of contributory infringement against Computer Sports World, Russell Culver, and Keith Glantz, all of whom supply statistical data for Sports Features. Because these parties were not named in the original complaint but were added in late August 1991, the district court did not err in dismissing the actions brought against these defendants as being barred by the statute of limitations.

CONCLUSION

We have considered all of the arguments advanced by Kregos on this appeal and conclude that none of them has merit. Accordingly, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 2007 (GLG)

GEORGE L. KREGOS, d/b/a AMERICAN SPORTS WIRE,
Plaintiff,

-against-

THE ASSOCIATED PRESS, SPORTS FEATURES SYNDICATE, INC., COMPUTER SPORTS WORLD, KEITH GLANTZ, and RUSSELL CULVER,
Defendants.

OPINION

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GOETTEL, D.J.

In bygone days, baseball reigned as America's favorite pastime. Sadly, this honor seems to now belong to lawsuits. We see it on every front, on the front pages of newspapers, over cable television's airwaves, and in the public discourse. Too often, the fields of dreams have given way to courtrooms, the drama of sport has dissolved into the wrangling of litigation. This case concerns another short chapter of this story, long the preoccupation of devoted fans, baseball statistics.

I. FACTUAL BACKGROUND

Plaintiff George Kregos d/b/a American Sports Wire created a form or chart of statistics on baseball pitchers which has been published in newspapers nationwide since 1983. The form includes certain categories of statistics for the game's probable pitchers including their won-loss records, earned run averages ("ERA"), and number of innings pitched against particular opponents.

In 1983, Kregos sent a copy of his form directly to the Sports Editor of the Associated Press ("AP"). In 1984, the AP began running its own form on baseball pitchers' statistics that was nearly identical to the Kregos form. It appears that both the AP and Kregos derive their statistics from Major League Baseball, Inc.

In 1986, the AP revised its pitching form, changing certain statistical categories and adding certain others for men-on-base average and team record. In particular, the 1986 form compiles a pitcher's won-loss records and ERA

for all games against the day's opponent instead of Kregos' statistics for games against the day's opponent at the day's given site. Unlike its AP predecessor and the Kregos forms, the 1986 AP form included categories for "team record" and team record when the day's pitcher started games. The 1986 form is still used by the AP.

Kregos first accused the AP of copying his pitching form in 1984, and shortly thereafter, on the advice of his syndicate, began marking his form with a copyright notice. During discussions over the course of several days, Kregos was told by the AP's attorney that his pitching form was not copyrightable and that Kregos had no legal rights against the AP. Kregos contends that he was convinced by the AP's attorney but responded that it was "wrong." According to Kregos, he meant it was mortally wrong for AP to steal his form without being subject to any legal liability.

Also, according to Kregos, defendant Sports Features, which compiled the statistics for the AP pursuant to a contractual agreement, made false representations to him promising, in return for Kregos dropping his pitchers form complaints, to provide him with additional work in football, basketball, and baseball forms. Kregos maintains that he delayed taking any legal action for some time based upon these representations and the subsequent excuses for not delivering the extra work.

Kregos filed applications for copyright registration with the Copyright Office on June 25, 1985 and December 29, 1986. Although Kregos' attorney threatened suit in September 1986, no suit could be brought until Kregos received a certificate of copyright registration for his pitchers form. As plaintiff notes, 17 U.S.C. § 411(a), enacted in 1976, makes a registration of a copyright from the Copyright Office a prerequisite to the institution of a copyright infringement suit. 17 U.S.C. § 411(a) (1988); *see also*

Demetriades v. Kaufmann, 680 F.Supp. 658, 661 (S.D.N.Y. 1988).

The Copyright Office, applying a recent regulation regarding copyrights applications for screen displays, delayed making a final determination on Kregos' applications for two years. During the interim, Kregos' attorney notified counsel for AP and Sports Features in writing of Kreogs' intention to sue for copyright infringement upon issuance of his copyright registrations. Kregos commenced suit against the defendants AP and Sports Features in March 1989, four months after the final determination was made granting him his copyrights registrations. During those four months, the parties were engaged in settlement negotiations.

In February 1988, AP's attorney sent Kregos a letter that stated in part tht the format and presentation of the AP's baseball pitching statistics are "independently created for the Associated Press." In July 1989, during the course of discovery in this suit, the AP produced a 1984 internal memorandum which stated that the AP's 1984 baseball form "is virtually identical, both in content and in form" to the Kregos form. In creating the AP's form, the memo noted that the AP "consulted various other forms including the [Kregos] form, but used them only as examples."

In February 1990, this court granted summary judgment in favor of defendant AP on the grounds that the plaintiff's form was not copyrightable. *See Kregos v. Associated Press*, 731 F.Supp. 113 (S.D.N.Y. 1990). On appeal, the Court of Appeals reversed on the copyright issue and remanded the case for decision on the copyright claim dependent upon resolution of certain other issues. *See Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991); *but see Victor Lalli Enterprises v. Big Red Apple, Inc.*, 936 F.2d 671 (2d Cir. 1991) (holding that a compilation of race horse statistics was not entitled to copyright protection). The Circuit Court,

however, affirmed the district court's holding that the form was not protected under the Lanham Act.

At a conference in August 1991, this court allowed the plaintiff to file an amended complaint. Kregos did so on August 30, 1991 asserting additional claims under New York statutory and common law for unfair competition and fraud and named several additional defendants including Computer Sports World, Keith Glantz, and Russell Culver.

Defendant AP currently moves for summary judgment on plaintiff's copyright infringement claim and moves to dismiss the new claims of unfair competition, fraud, and violation of New York's consumer protection laws. Defendant AP also moves for Rule 11 sanctions. The other defendants have joined in the AP's present motions. In addition to opposing the AP's motions, plaintiff has cross-moved for Rule 11 sanctions against the AP.

Defendants challenge the copyright infringement claims arguing, on the merits, that the AP's pitching forms do not infringe upon the Kregos form as a matter of law. Specifically, defendants argue that the 1986 AP form is not substantially similar to the Kregos form, and was an independently created factual compilation. Defendants contend that plaintiff's infringement claims concerning its 1984 form are barred by the statute of limitations and no grounds exist to equitably toll the statute which expired for all infringements claims except those accruing after March 1986.

Defendants also contend that plaintiff's fraud claim should be dismissed for failure to show any reliance on the AP attorney's purported fraudulent communications, failure to plead fraud with particularity, and failure to raise the claim in a timely fashion. As to the unfair competition claims, defendants argue for dismissal based upon the law of the case, federal preemption, and failure to state a claim.

Plaintiff offers several responses. He contends that substantial similarity between the 1986 AP form and his own exists and that the statute of limitations should be tolled based upon the Office of Copyright Registration's delays and the defendants's fraudulent legal representations. Plaintiff further argues that his fraud and unfair competition claims, both adequately plead, should not be dismissed because they are neither barred by the law of the case nor preempted.

II. DISCUSSION

A. Copyright Infringement

Defendants seek summary judgment on plaintiff's claims of copyright infringement against both the 1986 and 1984 AP forms. The court can only grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). As the moving parties, defendants carry the burden of demonstrating the absence of any material factual disputes. *Heyman v. Commerce & Industry Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

The court's function is not to resolve factual issues but simply to determine whether such issues exist. *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4 (2d Cir. 1983). In making this determination, the court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party, here Kregos. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d. Cir. 1985). Uncertainty regarding the true state of any material fact is enough to defeat a summary judgment motion. *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2d Cir. 1982).

We shall first address the copyright infringement claims against the 1984 AP form. In its earlier opinion, the Court of Appeals noted that it "made no determination concerning the possible effect of the statute of limitations."

Kregos, 937 F.2d at 710 n. 8. This issue has now stepped up to the judicial plate. Defendants argue that all infringement claims relating to the 1984 form are barred by the statute of limitations. Plaintiff responds that the statute should be equitably tolled.

The statute of limitations on copyright infringement claims is contained in 17 U.S.C. § 507(b) which states that "[n]o civil action shall be maintained under the provision of this title unless it is commenced within three years after the claim accrued." Plaintiff's original complaint was filed in March 1989. Therefore, defendants are correct that all infringement claims accruing before March 1986 have struck out. This would include any claims against the 1984 AP form absent some reason to equitably toll the statute.

Essentially, plaintiff argues that the substantial identity between the 1984 and 1986 AP forms justifies treating them as a continuing infringement. This, argues plaintiff, tolls the statute of limitations for the 1984 form ,allowing it to relate back to the claims against the 1986 AP form. While we agree that a continuing infringement upon a copyrighted work could exist, we find that no continuing infringement can be shown in this case.

Although the alleged infringement by the 1986 AP form occurred within the three-year statute of limitations, the 1984 form's alleged infringement accrued more than three years ago. Even though the identity of the alleged infringer is the same and plaintiff claims that both AP forms infringe, this does not mean the claims in essence constitute a single continuing wrong.

The cases relied upon by plaintiff differ in significant respects. Without exception, they involved allegations of infringements concerning a single infringing work, not easily separable, that occurred both before and after the statute of limitations period had expired. *Woods Hole Oceanographic Institute v. Goldman,* 228 U.S.P.Q. 874 (S.D.N.Y. 1985), involved a filmmaker's continuous at-

tempts to assert ownerships over a film created as part of a collaborative effort. *Id.* at 876. In *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983), the court determined that the initial act of copying and subsequent sales of those same infringing copies constituted a "continuing wrong." *Id.* at 1119.

This case would be more in line with *Taylor* if the AP had copied the Kregos form in 1984, used its copy for a short period of time, then two years later resumed use of its 1984 form. In that situation, both periods of infringement would relate to the same infringing work, and should be deemed a continuing infringement.

In the present case, though not separated by a significant span of time, the AP has created two distinct, identifiable forms that allegedly infringe upon Kregos' form. Even if there is found to be substantial identity between the AP's 1984 and 1986 forms, the wrong perpetrated by the 1984 form ended when the AP ceased its publication. The wrong associated with the 1986 form began upon its publication, which coincided with the cessation of the 1984 form's use. Plaintiff was fully aware of the 1984 form's publication and perfectly able to bring a separate infringement actions against each form upon its publication.

We follow the course set by the Second Circuit which gives full effect to 17 U.S.C. § 507(b)'s limitations allowing recovery only for those damages which accrued within the three-year period immediately preceding the commencement of suit. *See Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108, 1110-11 (2d Cir. 1977); *Gaste v. Kaiserman*, 669 F.Supp. 583, 584 (S.D.N.Y. 1987).

In a sense, both *Mount v. Book-of-the-Month Club* and *Gaste v. Kaiserman* invovled facts much closer to a continuing wrong than this case. Both of these cases involved later sales of an allegedly infringing work that was originally created and sold more than three years before the complaint was filed.

Plaintiff also asks the court to equitably toll the three-year statute of limitations based upon the Copyright Office's administrative delay as well as certain representations made by the AP's attorney to Kregos and promises of additional work made by defendant Sports Features.

The copyright infringement statute of limitations may be equitably tolled if justified under the circumstances. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984). We have little difficulty holding that plaintiff was not entitled to rely upon the legal representations of the AP's attorney regarding the copyrightability of the pitching forms.

Relying upon the legal opinions of an attorney who represents the person plaintiff was accusing of illegally copying his form is beyond the pale of reasonableness. Even accepting plaintiff's replay of the event, this legal "wild pitch" will do nothing to advance plaintiff's case for tolling the statute of limitations.

Similarly, we do not view plaintiff's alleged continued reliance upon the representations of Sports Features as reasonable, meriting the tolling of the statute. According to plaintiff, he was denied additional work for the football and basketball seasons and given spurious excuses by Sports Features for some two years. Such prolonged acceptance seems without justification. Each failure to deliver additional work should have given plaintiff pause before further delaying action on his infringement claims.

Assuming what plaintiff alleges as true, it was unreasonable to continue to rely upon broken promises of work for some two years and only commence action against defendant Sports Features in 1989, some two years after the statute of limitations for 1984 AP form infringement claim expired and three years after Sports Features allegedly failed to give plaintiff the baseball form business

in 1986. We decline to toll the statute of limitations under these circumstances.

We view plaintiff's claims of administrative delay as his strongest pitch. Before commencement of an action for copyright infringement, a person must register a copyright claim with the Copyright Office. 17 U.S.C. § 411(a). Indeed, "[r]eceipt of an actual Certificate of Registration or denial of same is a jurisdictional requirement." *Demetriades*, 680 F.Supp. at 661.

Plaintiff claims that institution of his suit was delayed two years pending the Copyright Office's action on his application. Defendants stress that any delays of plaintiff's application were a self-inflicted injury. In their view, plaintiff chose to wait until 1986 to file his application, despite notice that applications for software textual screen displays would be delayed, and yet opted against filing separate applications for the textual screen display and the underlying computer program.

Despite plaintiff's diligence in keeping abreast of the Copyright Office's progress on his application, we find no reason to toll the statute of limitations on his claims against the 1984 AP form. Plaintiff was forewarned that copyright applications involving screen displays would be delayed. That administrative delays created a statute of limitations problem was itself a self-induced problem. Had plaintiff not sat on his rights for so long, the Copyright Office's prolonged delay would have been avoided completely. We find no equitable reason to relieve plaintiff of the time constraints set by the statute of limitations. Consequently, we grant summary judgment in favor of the defendants on plaintiff's claims associated with the 1984 AP pitching form.

We now turn to the summary judgment motion as it relates to plaintiff's infringement claim for the 1986 AP form. Defendants argue that the 1986m AP pitching form does not infringe upon the Kregos form as a matter of

law. Naturally, plaintiff disagrees. Both sides seek support for their arguments in the Second Circuit's earlier opinion reversing this court's decision on the copyrightability of the Kregos form.

To establish a copyright infringement, the copyright holder must show that ownership of a copyright and that the alleged infringer copied the protected work. *See Rogers v. Koons,* 1992 U.S. App. LEXIS 5792 at 12 (2d Cir. 1992) (citing *Weissmann v. Freeman,* 868 F.2d 1313, 1320 (2d Cir.), *cert. denied,* 493 U.S. 883 (1989)). Defendants do not take issue with plaintiff's ownership of a copyright for the Kregos pitching form. Plaintiff's infringement claim for the 1986 AP form thus turns on whether the AP copied the Kregos form. Because a copier is raredly caught in the act, copying is generally established by the proof of defendant's access and substantial similarity between the works. *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.,* 558 F.2d 1090 (2d Cir. 1977).

Substantial similarity is not synonymous with the copying of every last detail. The core question is whether "the average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu Ltd.,* 360 F.2d 1021, 1022 (2d Cir. 1966).

Defendants contend that the Kregos pitching form represents a factual compilation with only a limited number of possibilities of expression. Where only limited ways exist to express certain ideas, similarity alone cannot form the basis of an infringement claim. *See Decorative Aides Corp. v. Staple Sewing Aides Corp.,* 497 F.Supp. 154, 157 (S.D.N.Y. 1980), *aff'd without op.,* 657 F.2d 262 (2d Cir. 1981).

The Kregos pitching form, while itself a compilation of facts, was not simply one option out of a limited number of ways to express these facts. As the Court of Appeals stated:

> There are at least scores of available statistics about pitching performance available to be calculated from the underlying data and therefore thousands of combinations of data that a selector can choose to include in a pitching form.

Kregos, 937 F.2d at 704. Both the Court of Appeals and this court recognized that plaintiff's *arrangement* of pitching statistics—for example, the format of the columns and headings—represented a "garden-variety" pitching form, but a conclusion could not be reached as a matter of law that his *selection* of a combination of nine statistics from the universe of possible combinations of pitching statistics could not satisfy the creativity requirement for copyrightable expression. *Id.* at 705.

There is no dispute regarding defendants' access to the Kregos pitching form. It has been published in newspapers across the country since 1983 and the AP's Sports Editor was sent a copy in 1983. An internal AP memorandum dated April 3, 1984 also expressly discusses the Kregos form. The record supports only one possible conclusion, that the AP had access and actual knowledge of the Kregos form. Indeed, defendant AP has expressly admitted this in connection with its 1984 form while arguing its irrelevance given its statute of limitations position.

Substantial similarity is the central issue of plaintiff's infringement claim. In general, the existence of substantial similarity is a factual issue. *Ideal Toy Corp.*, 360 F.2d at 1022. Defendants, for purposes of the current motion, admitted that its 1984 form was virtually identical to the Kregos form in both form and content. Defendant AP's Reply to Plaintiff Kregos' Statement of Material Facts at 3. The similarity between the Kregos form and the 1986 AP form, however, is a whole new ballgame. The AP vigorously disputes the legal similarity of its 196 form to the Kregos form, claiming it is sufficiently different to shield the AP from an infringement claim. Essentially,

defendants argue that the differences between the Kregos form and earlier pitching forms that made the Kregos form copyrightable are no greater than the differences between the 1986 AP form and the Kregos form.

The 1986 AP form and the Kregos form are not identical, differing in three respects. The 1986 form includes two categories not appearing in the Kregos form, "Team Record" and the team's season record for games started by that day's pitcher. The Kregos form also contains a set of statistics "VS OPP AT SITE" that includes the pitchers' won-loss record, number of innings pitched, and earned run average for the season when pitching against that day's opponent at the site of that day's game. The 1986 AP form compiles these three statistics into the broader category of "VS OPP" which is not limited to that day's site but includes a team's home and away games against the day's opponent.

Kregos argues that the "VS OPP AT SITE" and "VS OPP' categories are identical in some instances and therefore these categories are substantially similar. This is true at the beginning of the baseball season before two given teams have played each other at least once in each of their home fields. Kregos argues that changing two categories of pitching statistics represents only minor modifications leaving intact the substantial similarity between the forms, or at least creates a material factual dispute over their substantial similarity.

Defendants respond that the issue of infringement was for all purposes decided by the Court of Appeals which stated that:

> The reason for doubting that the AP's 1986 form infringes Kregos' form arises from the same consideration that supports Kregos' claim to a copyright. Kregos can obtain a copyright by displaying the requisite creativity in his selection of statistics. But if someone else displays the requisite creativity by mak-

> ing a selection that differs in more than a trivial degree, Kregos cannot complain. Kregos contends that the AP's 1986 form makes insignificant changes from its 1984 form. But Kregos cannot have it both ways. If his decision to select, in the category of performance against the opposing team, statistics for the pitcher's current season at the site of today's game displays, in combination with his other selections, enough creativity to merit copyright protection, then a competitor's decision to select in that same category performance statistics for the pitcher's season performance both home and away may well insulate the competitor from a claim of infringement. Thus, though issues remain to be explored before any determination can be made, it may well be that Kregos will have a valid claim only as to the AP's 1984 form.

Kregos, 937 F.2d at 710. The Court of Appeals did not expressly decide this issue, noting issues in the case that remained unexplored. The implication of the court's reasoning is readily apparent. The degree of added creativity that supports the copyrightability of Kregos' pitching form differs little from the additional creativity needed to shield defendants' form from an infringement claim.

While several forms predating the Kregos form contained certain of plaintiff's categories, no single pitching form that predated the Kregos form contained more than three of the nine categories of pitching statistics included in the Kregos form. As an aside, we note that most of Kregos' categories already existed in one or another existing forms. The Court of Appeals held that Kregos' degree of variation from existing forms could not constitute differences of only a trivial degree. *Id.* at 705.

Here, the 1986 AP form contains two statistics totally absent from the Kregos form, the team's won-loss record for the season and the team's won-loss record for the season when that day's pitcher has started the game. The

other major difference is Kregos' use of three statistics for the pitcher's season performance against the day's opponent at the day's site as compared to the AP's use of these three statistics against the day's opponent at any site. In total, of the ten performance statistics compiled in the 1986 AP form, five are different from those used in the Kregos form.

The question becomes, does fifty percent similarity equate to substantial similarity? The Court of Appeal expressed its sense that the degree of differences that enabled Kregos to copyright his pitching form might similarly shield the AP from an infringement claim. Courts have noted in copyright infringement cases that determining whether substantial similarity exists between competing works is a question often subject to resolution as a matter of law, particularly when the court holds as a matter of law that the similarity between the works is insubstantial. *See, e.g., Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986); *Wickham v. Knoxville International Energy Exposition, Inc.*, 739 F.2d 1094 (6th Cir. 1984); *See v. Durang*, 711 F.2d 141 (9th Cir. 1983).

We reach a similar conclusion in this case. The AP's addition of two categories not present in the Kregos form together with the alteration of a set of three statistics leaves the 1986 AP form with five statistics not present in the Kregos form. No reasonable person could conclude that the inclusion of five different statistics out of the ten used by the 1986 AP form still leaves it substantially similar to the Kregos form.

Perhaps even more significantly, certain of the differences that exist between the 1986 AP form and the Kregos form bear on the copyrightable portions of the Kregos form. Summary judgment is permitted "where there is an obvious lack of similarity between the copyrightable elements of the plaintiff's expression of a given idea and the defendant's expression of the same idea." *Black v. Gosdin*,

740 F.Supp. 1288, 1291 (M.D.Tenn 1990) (interpreting a 2nd Circuit case concerning summary judgment on copyright claims).

In large part, the creativity of the Kregos form serving as the foundation for its copyrightability rested on the plaintiff's creation of a general category of "VS OPP AT SITE," a category of statistics never before used. This is precisely the set of statistics that the 1986 AP form has changed. In its place, the AP uses the broader category of "VS OPP," a category that includes all games between the day's teams started by the day's pitchers.

Further, the appropriateness of resolving the issue of substantial similarity on summary judgment has been discussed by this circuit. In *Warner Bros., Inc. v. American Broadcasting Corp., Inc.*, 720 F.2d 231 (2d Cir. 1983), the court noted that:

> [t]he 'substantial similarity' that supports an inference of copying sufficient to establish infringement of a copyright is not a concept familiar to the public at large. It is a term to be used in a courtroom to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement.

720 F.2d at 245. The 1986 AP form contains five categories of statistics not found in the Kregos form. The Kregos form contained six categories of statistics not found together in any earlier forms. The balance we strike in this case, alluded to by the Court of Appeals, protects defendants against an infringement claim when the differences between their form and plaintiff's pitching form involve the very elements that made the Kregos form copyrightable.

"[A] court may compare the two works and render a judgment for the defendant on the ground that as a matter

of law a trier of fact would not be permitted to find substantial similarity." *Wickham*, 739 F.2d at 1097. We do so here and hold that no substantial similarity exists between the Kregos form and the 1986 AP form. Consequently, we grant defendants' summary judgment on the copyright claims associated with the 1986 AP form.[1]

B. Common Law Fraud

Defendants seek dismissal of plaintiff's claims of common law fraud on the grounds that the complaint fails to state a cause of action. The crux of plaintiff's fraud claims is his significant delays in commencing this infringement action were due in part to his reliance upon misrepresentations made by the AP's attorney and promises made by Sports Features.

The elements of common law fraud under New York law are a material, false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage to the plantiff. *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2d Cir. 1987); *Roso v. Saxon Energy Corp.*, 758 F.Supp. 164, 168 (S.D.N.Y. 1991).

In this case, we do not find that any actionable fraud has been committed by the AP. In September 1986, plaintiff advised defendants of his intention to file an action for infringement after his copyright registration was received. Plaintiff, who was unrepresented at the time, claims that he was convinced by the AP's attorney of the uncopyrightability of a pitching form. Even so, plaintiff had no reasonable right as a matter of law to rely upon legal opinions offered by the AP, an entity occupying an adversarial position by this point. As a result, we dismiss plaintiff's claim of common law fraud against the AP.

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[1] Were we not to grant summary judgment on the defendants' motions, we do not know of any factual issues to be tried that would bear on the substantial similarity of the works.

Plaintiff also states a fraud claim against defendant Sports Features stemming from alleged representations promising additional work in return for plaintiff's agreement not to pursue his infringement claims. In plaintiff's view, Sports Feature's promises, excuses for delay, and failure to offer plaintiff further work continued through 1986, and constituted a fraud on plaintiff.

Sports Features denies making any promises of additional work to plaintiff. Sports Features, joining in the AP's arguments in opposition, also argues that plaintiff's fraud claims are time-barred. Under New York law, a claim of common law fraud must be brought within six years from accrual or two years from discovery, whichever period is longer. *See* N.Y.Civ.Prac.L. & R. §§ 203(f) and 213 subd. 8; *see also IIT, International Invest. Trust v. Cornfeld*, 619 F.2d 909, 928-29 (2d Cir. 1980).

In response, plaintiff contends that the fraud perpetrated by Sports Features was of a continuing nature, lasting until at least August 1986 when Sports Features terminated the use of the Kregos pitching form in the Chicago Sunday [Sun] Times. Whether Sports Features had fraudulently promises additional work to forestall an infringement suit threatened by Kregos is a disputed material fact that cannot be resolved on the record as a matter of law.

Sports Features assumes that the fraud claim accrued in 1984, at the same time plaintiff's fraud claim against the AP accrued. Sports Features apparently misconstrues plaintiff's claims against it' plaintiff' fraud claims against the AP and Sports Features are distinct. Kregos contends that Sports Features made a series of fraudulent statements, all intended to delay the legal action threatened by plaintiff. According to plaintiff, the final fraudulent act occurred in 1986 when defendant failed to use his baseball form.

If Sports Features made such representations with the intent of delaying Kregos' proposed legal action, the series of excuses and promises might constitute a continuing fraud, at least for a year or two until it became apparent that no work would be forthcoming. Each statement allegedly made by defendant was purportedly made with a single object in mind, to stay Kregos' hand. As a result, plaintiff's cause of action for fraud would accrue each time Sports Features promised additional work and failed to deliver.

If true, plaintiff's fraud claim accrued in 1986 and plaintiff filed his amended complaint alleging fraud in August 1990. Applying the six-year statute of limitations from the point of accrual, plaintiff's fraud claim against Sports Features would not be time-barred. However, to claim fraud plaintiff must also show damages. Although factual issues concerning continuing nature of Sports Feature's alleged fraud, these are immaterial given the lack of damages to plaintiff.

The purported fraud by Sports Features did not prevent the court from reaching the merits of plaintiff's claims concerning the 1986 AP form. Our holding on this claim stands independent of any promises allegedly made by Sports Features or the AP. The only conceivable damages plaintiff could claim is that the fraudulent representations made by Sports Features prevented plaintiff from commencing a copyright infringement action for the 1984 AP form before the three-year statute of limitations expired.

Plaintiff has not stated an independent claim of fraud but merely reformed one of his arguments offered for tolling the three-year statute of limitations for one of his copyright claims, an argument we have already found unconvincing. Moreover, the crux of plaintiff's argument regarding Sports Features' fraudulent promises sounds more in contract than in fraud. Essentially, plaintiff is arguing that he orally agreed not to pursue his infringement claims

in exchange for additional work which Sports Features promised to provide. Even if true, this would appear to state (inadequately however) a claim for breach of contract rather than a fraud claim. Since plaintiff has not adequately pled fraud and has not stated a claim in contract considering the Statute of Frauds, we dismiss plaintiff's fraud claim against Sports Features.

C. Unfair Competition

The third claim asserted by Kregos is a claim of unfair competition under New York law. Defendants argue that the Court of Appeal's dismissal of plaintiff's Lanham Act claims bars plaintiff from reformulating its unfair competition claims under New York common law. Additionally, defendants argue that the unfair competition claim is preempted under 17 U.S.C. § 301 and generally fails to state a claim upon which relief can be granted.

Defendants correctly note that the standards for § 43(a) claims under the Lanham Act and unfair competition claims under New York law are virtually the same. *E.R. Squibb & Sons v. Cooper Laboratories, Inc.*, 536 F.Supp. 523, 526 (S.D.N.Y 1982). The essence of both causes of action is the likelihood that the public will be confused as to the source of the allegedly infringing product. *Id.; see also Olay Co. v. Cocacare, Inc.*, 218 U.S.P.Q. 1028, 1036 (S.D.N.Y. 1983) (citing *Harlequin Enterprises, Ltd. v. Gulf & Western Corp.*, 644 F.2d 946 (2d Cir. 1981)).

Plaintiff responds that the standard applied by the Court of Appeals to his Lanham Act claim differs from the standard under New York law for unfair competition claims. Thus, says plaintiff, the law of the case does not bar his unfair competition cause of action. Plaintiff reads the decision of the Court of Appeals to mean that more than simply the application of a false copyright notice is required to constitute a Lanham Act violation.

We do not share plaintiff's interpretation of the Court of Appeals decision. The circuit court did not hold that an

express claim of originality is required to sufficiently plead a claim for false copyright notice. The Court of Appeals stated that the Sports Features' copyright notice neither claims originality "nor does the notice contain *any* representation that is false." *Kregos*, 937 F.2d at 711 (emphasis added). In short, the court held that a copyright notice must contain *some* falsity beyond simply the falsity of infringement in order to support plaintiff's Lanham Act claim. Otherwise, all copyright infringement claims could automatically be converted in Lanham Act violations. *Id.*

Defendants also argue that plaintiff's unfair competition claims are preempted by 17 U.S.C. § 301 which states in part that:

> all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a). All parties agree that under § 301, a state cause of action is preempted by federal copyright laws if the subject matter of the state law rights falls within the subject matter of the copyright laws and the state law rights asserted are equivalent to the exclusive rights protected by the federal copyright laws. *Harper & Roe, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

"A state right is equivalent to copyright if the state right 'is infringed by the mere act(s) of reproduction, performance, distribution or display.' " *Universal City Stu-*

dios, Inc. v. The T-Shirt Gallery, Ltd., 634 F.Supp. 1468, 1474 (S.D.N.Y. 1986) (quoting *Mayer v. Josian Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523, 1535 (S.D.N.Y. 1985)). Where a state law violation requires an extra qualitative element beyond these acts, preemption is inapplicable. *Universal City*, 634 F.Supp. at 1475.

Plaintiff contends that proof of his unfair competition claim requires more than simply acts of reproduction, performance, distribution, or display. His unfair competition claim challenges defendants' false designation of authorship of a copied work. According to plaintiff, this requires proof of an additional element, use of a false copyright notice since the only way to falsely designate the authorship of Kregos' pitching form, because the form is not accompanied by the creator's name, is to attach a false copyright notice.

We disagree. The mere reproduction of Kregos' form by the AP, without any signature or false copyright notice or any outward sign of ownership, could itself support a state claim for false designation of ownership. The appearance of a pitching form in a newspaper's sports page, if not expressly attributing the work to someone else, implies that the form was the creation of a person on the newspaper's staff. The AP's mere act of reproducing the Kregos form could support an unfair competition claim for false designation of ownership. Plaintiff's state claim for unfair competition, as it is asserted in this case at least, is equivalent to copyright and therefore federal copyright law provides the exclusive avenue of relief. Plaintiff's unfair competition claim is preempted pursuant to 17 U.S.C. § 301.

In addition, we note that given our holding that no substantial similarity exists between the 1986 AP form and the Kregos pitching form, plaintiff's claim for unfair competition must correspondingly fail.

To conclude, we grant defendants' motion for summary judgment on the copyright claims and grant defendants' motions to dismiss plaintiff's claims of fraud and unfair competition. Lastly, while we have found plaintiff's arguments largely unpersuasive, we do not view them as frivolous or sanctionable. As a result, we deny defendants' motion for Rule 11 sanctions. The Clerk will enter judgment for the defendants.

SO ORDERED.

Dated: White Plains, New York.
June 10, 1992.

/s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

KREGOS FORM
HARTFORD COURANT
MAY 20, 1984

Today's Games

Team	Probable Pitcher (H)	Time	Odds	1984 W/L	1984 ERA	vs. team at site W/L	vs. team at site IP	vs. team at site ERA	Last 3 starts W/L	Last 3 starts IP	Last 3 starts ERA	MBA
AMERICAN LEAGUE												
OAK	Sorensen (R)		-	1-5	4.69	0-1	0⅔	27.00	0-2	20⅓	3.98	14.61
DET	Wilcox (R)	1:30	8½-2	5-0	3.09	1-0	9	2.00	2-0	17	2.65	12.71
CHIC	Dotson (R)		-	5-2	3.08	2-0	12⅓	2.13	2-0	23⅓	3.47	9.64
TORN	Stieb (R)	1:35	6-7	5-0	2.15	1-1	16	1.69	1-0	24⅓	2.59	10.36
CAL	Romanick (R)		-	4-3	5.00	-	-	-	1-2	16⅓	4.86	15.66
N.Y.	Guidry (L)	2:00	7-8	2-2	4.03	2-0	18	3.00	1-0	19	4.74	12.79
SEAT	Moore (R)		-	1-2	3.19	-	-	-	0-1	20	4.05	9.45
BALT	Flanagan (L)	2:05	8½-2	2-3	5.16	1-0	9	0.00	0-1	15	7.20	16.80
BOST	Clemens (R)		-	0-0	6.35	-	-	-	0-0	5⅓	6.35	22.24
MINN	Butcher (R)	2:15	6½-7½	2-1	1.99	0-0	5⅓	6.75	0-0	12⅓	2.19	12.41
CLEV	Heaton (L)		-	2-3	5.77	-	-	-	0-1	13	9.00	19.38
MIL	Sutton (R)	2:30	8-9	3-2	2.73	1-0	17	3.18	1-0	22	2.05	9.82
TEX	Mason (L)		-	0-2	2.21	-	-	-	0-2	20⅓	2.21	8.85
K.C.	Saberhagen (R)	2:35	5½-6½	1-2	3.33	-	-	-	0-2	18⅓	3.93	10.80
NATIONAL LEAGUE												
ATL	Barker (R)		-	3-4	3.67	-	-	-	1-1	20	1.35	11.25
PITT	DeLeon (R)	1:35	Even-6	1-1	6.06	-	-	-	1-1	16⅓	6.06	14.88
CINN	Pastore (R)		-	1-3	6.31	1-0	9	0.00	1-1	17⅓	4.67	8.83
STL	LaPoint (L)	2:15	6-7	5-4	4.23	-	-	-	2-1	19	3.32	11.84
HOUS	Scott (R)		-	2-1	4.35	0-0	2	13.50	1-0	18⅓	2.95	9.33
CUBS	Sanderson (R)	2:20	6½-7½	4-1	2.34	0-1	5	7.20	1-0	12⅓	3.65	12.41
METS	Torrez (R)		-	0-3	7.11	0-1	5⅓	8.44	0-2	11⅓	3.18	16.68
S.D.	Lollar (L)	4:05	6½-7½	2-4	5.27	1-1	13⅓	3.29	0-2	16⅓	5.94	15.12
MONT	Smith (R)		-	5-2	2.98	0-1	6⅓	4.26	1-1	20⅓	2.66	14.61
L.A.	Reuss (L)	4:05	6-7	3-2	4.34	1-0	9	1.00	1-2	16⅓	4.41	10.47
PHIL	Hudson (R)		Even-6	6-2	4.63	0-1	4	11.25	1-2	14⅓	6.28	12.56
S.F.	Robinson (R)	4:05	-	3-4	2.72	-	-	-	1-1	21⅓	2.11	9.70

Bottom team is home team. Favored team is designated by odds beside pitcher's name. All pitching data reflects the pitcher's past performance as a "starter." 1984 — Pitcher's 1984 record as "starter." Vs Team at site — Pitcher's past performance vs. today's opponent at the site of today's game. Last 3 Starts — Reflects how pitcher is currently going. Details his performance over his last three starts. W/L — Won/lost record as a "starter". IP — Innings pitched ERA — Earned run average. MBA — Men on base average. (Average number of men allowed to reach base via hits and walks per nine innings pitched.) The odds are estimated lines. Time is Eastern Daylight Time

EARLIER AP FORM
THE SUN
APRIL 19, 1984

TODAY'S GAMES

American League

	Pitchers	Time	Line	1984 Record W-L	1984 Record ERA	'84 vs. opp. at this site W-L	'84 vs. opp. at this site IP	'84 vs. opp. at this site ERA	Last three starts W-L	Last three starts IP	Last three starts ERA	Last three starts AHWG*
Orioles	McGregor(L)			1-2	6.61	1-0	8.1	1.08	1-2	16.1	6.61	15.4
Toronto	Clancy (R)	1:35	6-7	0-1	2.41	1-0	9.0	0.00	0-1	18.2	2.41	12.5
Texas	Hough (R)			1-1	4.58	0-0	0.0	0.00	1-1	19.2	4.58	13.3
Boston	Hurst(L)	2:05	6-7	1-2	2.55	2-0	15.2	1.72	1-2	17.2	2.55	10.2
Chicago	Dotson (R)			1-1	1.59	0-0	0.0	0.00	1-1	17.0	1.59	9.5
Milwaukee	Cocanower(R)	2:30	PK	0-1	5.11	0-0	0.0	0.00	0-1	12.1	5.11	13.1
Kansas City	Saberhagen(R)			0-0	0.77	0-0	0.0	0.00	0-0	11.2	0.77	2.7
Detoit	Petry(R)	1:30	7½-8½	2-0	1.69	0-0	0.0	0.00	2-0	16.0	1.69	9.0
New York	Rawley(L)		EV-6	0-1	33.75	0-1	14.0	6.43	0-1	1.1	33.75	33.8
Cleveland	Jeffcoat (L)	7:05		0-0	6.75	1-0	5.0	0.00	0-0	0.0	0.00	0.0

National League

Philadelphia	Carlton(L)			1-0	2.89	0-0	7.1	3.68	1-0	18.2	2.89	10.6
Pittsburgh	Rhoden (R)	12:35	PK	1-2	5.51	0-2	9.2	6.52	1-2	16.1	5.51	14.3
Montreal	Gullickson (R)			0-2	6.75	0-1	6.0	7.50	0-2	16.0	6.75	16.9
New York	Gooden (R)	1:35	PK	1-1	7.56	0-0	0.0	0.00	1-1	8.1	7.56	16.2
St. Louis	Cox (R)			2-0	4.05	0-1	3.1	10.80	1-0	9.1	5.79	11.6
Chicago	Trout (L)	2:20	EV-6	1-1	3.95	0-0	5.0	5.40	1-1	13.2	3.95	11.9
Cincinnati	Berenyi(R)			0-2	5.79	1-0	8.1	0.00	0-2	9.1	5.79	16.4
San Francisco	Robinson (R)	10:35	EV-6	1-1	1.64	0-0	0.0	0.00	1-1	11.0	1.64	9.8
San Diego	Show(R)			2-0	2.18	1-0	7.0	2.57	2-0	20.2	2.18	9.6
Los Angeles	Pena(R)	10:35	5½-6½	1-0	1.93	0-1	6.0	1.50	1-1	14.0	1.93	10.3

* Average men on base per nine innings.

CURRENT AP FORM
HARTFORD COURANT
SEPTEMBER 17, 1987

Today's games and pitching matchups

Team	Probable Pitchers (W)	Time	Line	1987 W-L	1987 ERA	Team Rec	Vs Opp W-L	Vs Opp IP	Vs Opp ERA	Last 3 Starts W-L	Last 3 Starts IP	Last 3 Starts ERA	BRA
AMERICAN LEAGUE													
Toronto	Ceruti (L)		Even-6	10-4	4.16	13-7	1-1	10⅓	10.13	1-1	17	4.76	13.8
New York	F[illegible]on (L)	7:30p		0-0	7.88	0-0	0-0	0⅓	0.00	—	—	—	—
Seattle	E[illegible]nkhead (R)			9-8	5.12	12-11	2-1	19⅓	3.68	2-0	20	1.80	7.2
Chicago	Long (R)	8:00p	Even-6	8-8	4.17	11-10	1-2	16⅓	5.87	0-2	15⅓	8.22	16.4
California	Witt (R)			15-12	3.85	17-15	0-2	18	3.38	0-3	25⅓	3.86	12.3
Kansas City	Leibrandt (L)	8:35p	6-7	16-10	3.04	18-13	2-0	15	2.40	2-1	21⅓	4.15	12.9
NATIONAL LEAGUE													
Chicago	Moyer (L)			11-13	4.98	12-17	2-1	27	3.33	1-2	19⅓	3.72	10.7
Philadelphia	Carman (L)	1:35p	6-7	10-10	4.62	15-15	0-1	5	3.60	2-1	14⅓	5.52	18.0
Atlanta	Z.Smith (L)			15-8	3.97	21-12	1-0	9	1.00	1-1	19	3.79	12.3
San Diego	Show (R)	4:05p	6½-6½	7-16	4.00	11-20	2-1	21⅓	4.22	1-1	21⅓	1.86	12.0
Houston	Darwin (R)			8-9	3.60	16-11	0-0	13⅓	7.43	0-2	11⅓	5.40	15.4
San Francisco	Reuschel (R)	4:05p	7-8	12-7	2.75	4-1	—	—	—	3-0	25	1.44	5.4
Cincinnati	Rasmussen (L)			2-1	5.40	2-1	—	—	—	2-1	18⅓	5.40	10.3
Los Angeles	Valenzuela (L)	7:05p	5½-6½	12-13	4.10	13-17	1-3	29	5.28	1-2	26⅓	3.76	12.3
Cincinnati	Power (R)		DH	10-11	4.33	17-13	2-1	23	2.74	0-3	17	5.82	13.2
Los Angeles	Welch (R)		5½-6½	11-9	3.46	18-13	2-0	13	4.15	0-1	21	5.57	11.8
St. Louis	Mathews (L)		Even-6	10-9	4.02	13-15	0-1	12	3.75	1-1	23	2.74	9.4
Pittsburgh	Dunne (R)	7:35p		11-5	2.86	11-8	1-0	9	1.00	3-0	23	2.74	11.3
New York	Cone (R)		Even-6	5-3	3.78	6-4	0-0	5	5.40	2-0	19⅓	1.83	9.6
Montreal	Perez (R)	7:35p		3-0	2.29	5-0	—	—	—	3-0	21⅓	2.53	10.5

Bottom team is home team. Favored team is designated by odds beside pitcher's name. All pitching data reflects the pitcher's past performance as a "starter." 1987 — Pitcher's 1987 record as "starter." Team Rec — Team's record in games started by today's pitcher. Vs Opp — Pitcher's performance this year vs. today's opponent. Last 3 Starts — Pitcher's performance over last three starts. W-L — Won/lost record as a "starter". IP — Innings pitched. ERA — Earned run average. BRA — Average number of men allowed to reach base via hits and walks per nine innings pitched. The odds are estimated lines.